SUPREME COURT, U. S.

FILED

FEB 7 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-665

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
VOLKSWAGEN OF AMERICA, INC.,
and
IMPORT MOTORS OF CHICAGO, INC.,
Petitioners,

v.

PAUL D. PRASHAR,
and
DARLENE PRASHAR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

GEORGE J. DANFORTH, JR.
DANFORTH, DANFORTH & JOHNSON
464 Boyce-Greeley Building
Sioux Falls, South Dakota 57102
Attorney for Petitioners Volkswagenwerk Aktiengesellschaft and Volkswagen of America, Inc.

HARRY C. DOYLE
MAY, JOHNSON & BURKE
412 West 9th Street
Sioux Falls, South Dakota
Attorney for Petitioner Import Motors of Chicago, Inc.

Of Counsel

HERBERT RUBIN
BERNARD J. WALD
MICHAEL HOENIG
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005

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The opposing brief highlights the very point made in the petition for certiorari, *i.e.*, that the decision of the Eighth Circuit can only be supported by legal gymnastics which serve to confuse rather than enlighten. Faced with a decision which conflicts with law and logic, respondents open and close with two erroneous factual statements regarding the date of the filing of the petition and the presentation

of the constitutional arguments in the court below, apparently seeking to induce a denial of the petition on technical grounds. Sandwiched in between these misstatements is a discussion of the merits, premised, however, on a vital distortion of the actual issue involved.

Respondents' first and last points can be disposed of in one sentence. The petition is timely in that it was filed on October 17 and not on October 18, 1973, as respondents claim, and the constitutional issues which the petition presents were raised and discussed below in the Petition for Rehearing to the Eighth Circuit.*

Respondents' remaining contentions are equally without merit.

I.

Respondents' brief acknowledges, *sub silencio,* that *Hanna* v. *Plumer,* 380 U.S. 460 (1965), involved only Rule 4 of the Federal Rules of Civil Procedure and that the holding of that case relates only to the purely procedural aspects of the manner of service of process, rather than the statute of limitation issue dealt with in *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530 (1949). Apparently recognizing that *Hanna* thus left the holding of *Ragan* intact, the brief seeks to convey the false impression that the issue in this action differs from the one in *Ragan* and that, like in *Hanna,* the Eighth Circuit was merely concerned with a conflict between Federal and state rules regarding the manner of service. Although respondents' brief recites in some detail the steps taken to perfect service in this case, and concludes with the statement that service was "perfected upon each defendant" (p. 2, last sentence), the fact that no service in any manner was made on any defendant until *after* the statutory period is glossed over.

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* Point I of the Petition for Rehearing, relating to the constitutional aspects of this case, is annexed as an Appendix to this brief.

Had respondents, before the expiration of the statutory period, perfected service on petitioners in any manner provided in Rule 4 of the Federal Rules of Civil Procedure, *Hanna* v. *Plumer* would be relevant. If there had been delivery to a United States Marshal within that period respondents might have a colorable claim of attempted compliance with section 15-2-31 of the South Dakota Compiled Laws, which permits the statute of limitation to be tolled for sixty days by delivery of the summons to a sheriff or other officer within the statutory period. However, no service or attempt at service *in any manner* was made until *after* the statute of limitations had expired. *Hanna* thus has no application and this case is governed solely by the rule in *Ragan*.

II.

Respondents further attempt to support the Eighth Circuit decision below and to reconcile it with *Ragan* on the basis of the supposed difference between the Kansas statute involved in *Ragan* and the South Dakota statute involved in this case. Although both the Kansas and South Dakota statutes provide that an action is commenced by the service of a summons, respondents, noting the distinction in draftmanship between the Kansas and South Dakota statutes on which the Eighth Circuit premised its decision, conclude, without explanation or reason, that the Kansas statute is "substantive" while the South Dakota statute is "procedural." Even the strained opinion of the Eighth Circuit avoids this illogical characterization.

Both the Kansas and South Dakota statutes provide, in effect, that the very existence of an enforceable cause of action is dependent upon performance of a specified act—the service of a summons. The manner in which that service is to be performed may very well be a matter of procedure in which the rules applicable to Federal and state

actions vary. But no Federal procedural rule can be used to render a nullity the state statutory requirement that an act of service take place by a specified date. Where, as here, there has been no performance of the act in any manner prior to the expiration of the statutory period, the outcome is one of substance. Any other conclusion results in the perpetuation, through a Federal procedural rule, of rights and duties which have been extinguished under state law.

III.

Another recent case, *Smith* v. *Peters,* 482 F.2d 799 (6th Cir. 1973), in which a petition for certiorari is pending at present before this Court (No. 73-859), involves an attempt by the Sixth Circuit, in a more complex setting, to reconcile the decisions of this Court in *Ragan* and *Hanna.* It should be noted that, as the Eighth Circuit in this case was required to struggle with and distinguish its prior decision in *Groninger* v. *Davison,* 364 F.2d 638 (1966), so the Sixth Circuit in *Smith* v. *Peters* was required to reassess the position it took only a few years earlier in *Sylvester* v. *Messler,* 351 F.2d 472 (1965), *affirming per curiam* 246 F. Supp. 1 (E.D. Mich. 1964), *cert. denied,* 382 U.S. 1011 (1966).

Attempts to reconcile *Ragan* and *Hanna* have thus not only resulted in conflicting decisions among the Circuits, but they have in effect created basically inconsistent *intra*-Circuit decisions in at least two instances. We submit that, for this reason alone, certiorari should be granted, so that this Court may lay to rest the present confusion on a basic principle of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

February 5, 1974

Respectfully submitted,

GEORGE J. DANFORTH, JR.
DANFORTH, DANFORTH & JOHNSON
Attorney for Petitioners Volkswagenwerk Aktiengesellschaft and Volkswagen of America, Inc.

HARRY C. DOYLE
MAY, JOHNSON & BURKE
Attorney for Petitioner Import Motors of Chicago, Inc.

Of Counsel:

HERBERT RUBIN
BERNARD J. WALD
MICHAEL HOENIG
HERZFELD & RUBIN, P.C.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 72-1625 and 72-1670

PAUL D. PRASHAR and DARLENE PRASHAR,
Appellants,

v.

VOLKSWAGEN OF AMERICA, INC., a Corporation, and IMPORT MOTORS OF CHICAGO, INC., a Corporation,
Appellees,

VOLKSWAGENWERK AKTIENGESELLSCHAFT, a Corporation, also known as Volkswagenwerk, G.m.b.H.,
Appellant,

v.

PAUL D. PRASHAR and DARLENE PRASHAR,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION
Honorable FRED J. NICHOL, *Trial Judge*

PETITION FOR REHEARING

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The appellant Volkswagenwerk Aktiengesellschaft, and the appellees Volkswagen of America, Inc. and Import Motors of Chicago, Inc., feeling aggrieved by the opinion of the Court of Appeals filed June 27, 1973, do hereby respectfully petition the Court for a rehearing of said case, and in support thereof submit the following:

Appendix

POINT I

THE RESULT REACHED IN THE COURT'S OPINION CONSTITUTES AN UNCONSTITUTIONAL DEPRIVATION OF THE PROPERTY OF THE DEFENDANTS.

The June 27, 1973 opinion of the Court at Page 6 recognizes, and is indeed premised on the proposition, that *Ragan* v. *Merchants Transfer & Warehouse Co.* (1949), 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520, was not overruled by *Hanna* v. *Plummer* (1965), 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8. It further declares that "it is not the prerogative of this Court to overrule *Ragan*". Yet, we submit, this is exactly what the Court has done.

We respectfully urge that re-argument of this appeal before the Court *en banc* be granted and that on re-argument the Court follow the holding of the Supreme Court in *Ragan* and its own decision in *Groninger* v. *Davison* (C.A. 8—1966), 364 Fed.2d 638. The stylistic preference in draftsmanship of a particular legislature should not be the basis for overturning established law and creating confusion, especially where it results in a decision of doubtful constitutionality. The rejection by this Court of the analysis by Professor Moore (p. 11, Note 14), which was approved in *Groninger* (364 Fed.2d at 638) is unwarranted.

When all is said and done, the holding which is distilled from *Ragan* and *Hanna*, and which still is the law, is that where the state has included as an integral part of the causes of action which it has created a requirement that the proposed defendant be formally advised of the charges against him within a specified period of time, through personal service or essentially the same kind of procedure, the rights of the claimant cannot be enlarged by ex parte procedures in the Federal Court, i.e., the simple filing of a Complaint. Any holding to the contrary would, we submit, be unconstitutional.

The substantive rights of the plaintiffs in this case and the concomitant liabilities of the defendants have been created by the State of South Dakota. South Dakota has limited those rights and liabilities and made their very existence dependent upon the performance of a certain specific act by the plaintiffs. A procedural ruling of the Federal Court cannot increase the right of the plaintiffs or the liabilities of the defendants. A contrary result, such as the one reached by the Court in its June 27, 1973 decision, constitutes an unconstitutional deprivation of the property of the defendants.

The Court in its opinion (at page 6) indicates that the effect of its holding is merely to extend, possibly only for a few days, the time within which the defendants obtain actual knowledge of the claims against them and that this produces a very minimal hardship. However, although this may be true, it does not resolve the situation. Presumably there would be a very minimal hardship on potential defendants if the South Dakota Legislature had determined instead of a 3-year statute of limitations to provide a statute of limitations of three years and one month, or even four years. The point is that it has not done so.

A time limit of three years to the day, and no more, was provided. Any extension of this, even for one hour, is the sole province of the South Dakota Legislature and not of the Federal Courts. South Dakota has created and defined the rights involved in this suit. Such rights cannot be restructured or redefined by this Court.

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